Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-483

MRS. DOREEN M. WHITE,
Petitioner,

v.

EXCALIBUR INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI OF MRS. DOREEN M. WHITE

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Comes now respondent, Excalibur Insurance Company, and files this its Brief in Opposition to the Petition for Writ of Certiorari filed in the above-captioned matter, and respectfully urges the Court to deny the petition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has been reported. *See White v. Excalibur Insurance Company*, 599 F.2d 50 (5th Cir. 1979).

STATUTES INVOLVED

In addition to the statutes listed by petitioner, the court of appeals decision involved a construction of Ga. Code Ann. §§ 68-612 and 114-103. The text of these additional statutes is included as an appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

Respondent does not agree with the presentation of the questions presented for review by the petitioner. The issue, respondent submits, is whether this case presents any consideration which would favor review by this Court on certiorari. Respondent submits that it does not. There are no conflicting decisions among the circuit courts of appeals regarding the issues determined below. Furthermore, contrary to petitioner's assertion, no issue of preemption was raised or argued below and preemption is not an issue in this case.

Insofar as the merits are concerned, respondent submits that the issues below were whether plaintiff's decedent was a statutory employee under 49 U.S.C. § 304(e) and whether, further, plaintiff's decedent was a member of the public who had suffered actionable injury under Ga. Code Ann. § 68-612 permitting suit directly against a motor carrier's liability insurer.

STATEMENT OF THE CASE

Respondent has no serious disagreement with petitioner's statement of the case, although respondent shows that the case was succinctly stated by the court of appeals in the opinion below, 599 F.2d 50 at 51-52. Respondent does not agree, however, with the statement of the case to the extent that it attempts to paraphrase the decision of the district court. Respondent further states as an additional fact that there existed in force at the time of this accident a policy of worker's compensation insurance issued by Excalibur Insurance Company, insuring Superior Trucking, Inc., and obligating Excalibur to pay, when due, all compensation and other benefits required of the insured by the worker's compensation law of Georgia.

In that regard, plaintiff's decedent was covered, as a statutory employee, of Superior Trucking Company.

SUMMARY OF ARGUMENT

To summarize respondent's argument, respondent contends that there is no proper basis upon which this Court should review the decision of the Fifth Circuit Court of Appeals as prayed for in the petition for writ of certiorari. The special and important reasons justifying such review are not present. Contrary to petitioner's assertion, there is not a conflict of decision between the courts of appeals on this matter, as the brief will illustrate. Furthermore, there is no conflict arising from this decision with any applicable decisions of this Court.

In addition, the question involved below was not a question of such importance that it should be settled by this Court. The question decided below involved construction of the state law of Georgia and the interaction of state law with the federal law regulating common carriers. The question below, while complex, presented essentially a straightforward application of the principles embodied in 49 U.S.C. § 304(e) in conjunction with the law of Georgia under the Georgia Public Service Commission statutes and the Georgia law of worker's compensation. In short and in sum, the instant case is not a case presenting a question of such importance as would justify review by this Court and is certainly not a case for the exercise by this Court of its power of supervision over the lower courts.

ARGUMENT

The court of appeals found that plaintiff's decedent, a passenger and co-worker with Mr. Lindsey, the driver of

the leased vehicle, was a statutory employee of Superior Trucking Company, a certificated common carrier insured by Excalibur Insurance Company. Reading 49 U.S.C. § 304(e) as requiring motor carriers to assume full direction and control of leased vehicles and full responsibility for the operation thereof as if they were the owners of such vehicles, the circuit court found that plaintiff's deceased, as a statutory employee, was barred by Georgia law from seeking a remedy against Superior Trucking Company apart from worker's compensation.

As a result, because of the worker's compensation bar, plaintiff's deceased was held to have suffered no "actionable injury" which would permit him to recover directly against the insurance carrier under Ga. Code Ann. § 68-612 permitting direct action against insurers of motor carriers. The court found such a suit under 68-612 barred upon the dual ground that plaintiff's deceased had suffered no "actionable injury" and, in addition, was not a member of the "public" for whom the statute was enacted.

Turning then to liability under the federal law, the court found that recovery was barred under 49 U.S.C. § 315 because of the failure of plaintiff to secure a judgment against Superior Trucking Company as required under that statute. Accordingly, the circuit court of appeals affirmed the trial court's dismissal of the plaintiff's action.

Contrary to petitioner's assertion in her brief, the decision of the Fifth Circuit Court of Appeals is not in conflict with decisions of other courts of appeals. Although the Fifth Circuit noted its difference with the Fourth Circuit in *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974), a review of that decision shows that it is not in conflict with the result reached in

the instant case. In that case, the Fourth Circuit held improper a jury instruction that the existence of an independent contractor relationship between the lessor-direct employer and the lessee-common carrier would insulate the common carrier from liability and responsibility for the conduct of the leased driver, the court holding that the driver was the statutory employee of the carrier under 49 U.S.C. § 304(e). With this proposition respondent does not disagree. However, the court in *Proctor, supra,* was not presented with the further step of determining whether the applicable state workmen's compensation law or any other state law governing the employer-employee relationship might have applied to prohibit recovery. The *Proctor* decision turned upon the clearly erroneous instruction of the trial court that the independent contractor relationship would insulate the lessee-carrier from liability. That decision was thus not in conflict with the issue reached in this case.

Similarly, the case of *Cape Air Freight, Inc. v. United States,* 586 F.2d 170 (10th Cir. 1978), is certainly not in conflict with the court of appeals decision in this case. *Cape Air Freight, Inc., supra,* held only that a cease and desist order from the Interstate Commerce Commission directed at the use of agents by a carrier was error. The court held that the use of leased equipment by carriers was permitted under federal law, subject, of course, to the control and responsibility requirements provided under the Interstate Commerce Act. Contrary to petitioner's assertion, the Fifth Circuit in the decision below did not prohibit the use of leased equipment, but only reaffirmed the intendment of 49 U.S.C. § 304(e) that the carrier be held responsible as if it were the owner, regardless of the relationship between the lessor and lessee.

The above decisions constitute the sole authority relied upon by the petitioner for a purported conflict between the courts of appeals. Respondent submits that there is no conflict.

Furthermore, the decision of the court of appeals is not in conflict with any applicable decisions of this Court. The authorities cited by petitioner in this regard are inapposite. *American Trucking Association v. United States*, 344 U.S. 298 (1953), involved an attack on the rules of the Interstate Commerce Commission governing leased vehicles. Those rules provided, *inter alia*, that any such contracts must be in writing; that control must be vested in the carrier; and that the carrier must undertake certain duties of inspection. The court's decision in that case simply upheld the rule-making power by the Interstate Commerce Commission over the use of such non-owned equipment. That issue is clearly not involved in this case.

Similarly, the case of *Transamerican Freight Lines v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975), does not constitute applicable authority in conflict with the Fifth Circuit decision. That case held simply that an indemnification provision entered into between a lessee-carrier and lessor providing for indemnification by the lessor to the lessee in the event of the lessor's negligence was valid and did not conflict with the statutory requirement that the carrier undertake operational control and responsibility for the vehicles regardless of the contractual relation between the parties. It is clearly not applicable to the instant case.

The present case is not one presenting an important question which should be settled by this court. The authority under the federal statute for the imposition of responsibility on motor carriers who lease equipment is

undisputed and is not called into question by these proceedings. The statute provides that the carrier will be responsible regardless of its contractual relations with the lessor, as if it were the owner of the vehicle. *See* 49 U.S.C. § 304(e). Implementation of this statutory dictate has given rise to the status of statutory employee. Thus, employees of an independent contractor will be deemed to be employees of the carrier to the extent necessary to effectuate the mandate of § 304(e). In short, employees of the lessor will be treated as employees of the lessee-carrier to the extent necessary to make the carrier responsible as if it had been the owner and operator of the vehicle. *See, e.g., Simmons v. King*, 478 F.2d 857 (5th Cir. 1973).

It is clear that under § 304(e) plaintiff's decedent was a statutory employee of the carrier. As such, the carrier was permitted to avail itself of the legal rights which would be applicable had the carrier in fact been the owner, operator and employer. Clearly, under this situation, plaintiff's right of action was barred under the Georgia worker's compensation law. *See* Ga. Code Ann. § 114-103.

It follows from the worker's compensation bar that a direct action against respondent could not be maintained under either state or federal law. The action was not maintainable under state law under familiar and well settled decisions of the Georgia courts. And a direct action was barred under 49 U.S.C. § 315 because no judgment was first rendered against the carrier as required under that statute. Indeed, petitioner does not proceed under § 315. *See* Petition at 16.

As the above outline of the holding of the court of appeals shows, this action presented a relatively straightforward application of settled legal principles to a some-

what novel factual situation. The result does not present an issue calling for a pronouncement from this Court.

CONCLUSION

In conclusion, respondent urges that the petition for writ of certiorari be denied. As outlined above, there are no special or important reasons for the grant of the court's discretion to review this matter on writ of certiorari. There is no conflict within the circuits; there is no conflict with applicable decisions of this Court; furthermore, the question presented is not an important question of federal law which should be confronted by this court. Rule 19, Rules of the Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. CULLEN GILLILAND, Attorney for Excalibur Insurance Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16 day of October, 1979, I served copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari of Mrs. Doreen M. White on Petitioner, Mrs. Doreen M. White, by mailing a copy, in a duly addressed envelope, with sufficient postage prepaid, to Mr. O. L. Crumbley, 206 American Federal Building, Macon, Georgia 31201, Counsel for Petitioner.

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APPENDIX

A-1

ADDENDUM

Section 68-612, *Ga. Code Ann.:*

Bond; indemnity in lieu of bond; self-insurance

No certificate shall be issued or continued in operation unless the holder thereof shall give and maintain bond, with adequate security, for the protection, in case of passenger vehicles, of the passengers and baggage carried, and of the public against injury proximately caused by the negligence of such motor common carrier, its servants or agents; and in the cases of vehicles transporting freight, to secure the owner or person entitled to recover therefor against loss or damage to such freight for which the motor common carrier may be legally liable; and for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants or agents. The commission shall approve, determine and fix the amount of such bonds, and shall prescribe the provisions and limitations thereof, and such bonds shall be for the benefit of and subject to suit or action thereon by any person who shall sustain actionable injury or loss protected thereby. The commission may, in its discretion, allow the holder of such certificate to file, in lieu of such bond, a policy of indemnity insurance in some indemnity insurance company authorized to do business in the State of Georgia, which policy must substantially conform to all of the provisions hereof relating to bonds, and must likewise be approved by the commission. The commission shall have power to permit self-insurance in lieu of a bond or policy of indemnity insurance, whenever, in its opinion, the financial ability of the motor carrier so warrants. It shall be permissible under this Chapter for any person having a cause of action arising hereunder in tort or contract to join in the same suit the motor carrier and its

surety in the event a bond is given. If a policy of indemnity insurance is given in lieu of bond, it shall be permissible to join the motor carrier and the insurance carrier in the same action whether arising in tort or contract.

(Acts 1931, pp. 199, 203; 1937, pp. 730, 731.)

Section 114-103, *Ga. Code Ann.:*

Other remedies excluded by this law

The rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service or death: Provided, however, that no employee shall be deprived of any right to bring an action against any third-party tortfeasor.

(Acts 1920, p. 176; 1972, pp. 929, 930.)